

***United States Court of Appeals
for the Second Circuit***



APPENDIX

DOCKET NO. 75-6126

75-6126

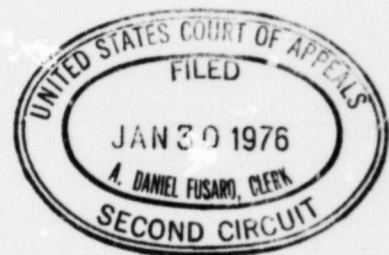
In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

ON APPEAL FROM JUDGMENT AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
WIENSTEIN, J.

JOINT APPENDIX

Docket No. 75-6126



Interstate Commerce Commission,
Plaintiff-Appellee

v.

Associated Air Freight, Inc.,
Defendant-Appellant

3

REPRODUCTION AS IN ORIGINAL COPY

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SUMMONS
AND
COMPLAINT

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 7-11-11

ELECTRIC COILS OF AMERICA, INC.,

Plaintiff

v.

SUMMONS

JAMES H. HARRINGTON, INC.,

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon JOHN P. CONWAY, Plaintiff's

attorney, whose address is 26 Federal Plaza, Room 1507, New York, N. Y. 10007.

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date: July 30, 1975

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

750 1221

INTERSTATE COMMERCE COMMISSION,
Plaintiff,

v.

ASSOCIATED AIRFREIGHT, INC.,
Defendant.

Civil Action No.

Injunction to Restrain -
Violations of the Inter-
state Commerce Act
49, U.S. Code 1017(b)(1)

COMPLAINT

Comes now the Interstate Commerce Commission, herein-
after called the Commission, an agency of the United States
of America, and for its complaint against the above-named
defendant alleges in one count as follows:

I.

That this suit is brought and the jurisdiction of
this Court is invoked under the provisions of Part IV of the
Interstate Commerce Act, more particularly Sections 412(d)
and 417(b)(1) thereof, (Title 49, Sections 1012(d) and 1017(b)
(1), U.S. Code), and under the general laws and rules relative
to suits in equity arising under the Constitution and the
laws of the United States.

II.

That at all times herein mentioned, the defendant,
Associated Airfreight, Inc., (hereinafter sometimes called
Associated), was and is a corporation existing under and by
virtue of the laws of the States of Virginia with its principal
place of business located at 167-16 146th Avenue, Jamaica,
Queens, State and Eastern District of New York, and was and

is an authorized surface freight forwarder and the holder of Permit No. FF-401 issued to it by plaintiff on March 13, 1973, and is therefore subject to Part IV of the Interstate Commerce Act (Chapter 13 of Title 49, U.S. Code) and within the jurisdiction of this Court.

Associated also holds authority as a domestic and international air freight forwarder from the Civil Aeronautics Board as set forth in CAB Permit Nos. 54 and 116.

Count I

That at all times mentioned herein defendant, Associated, has held authority from the plaintiff Interstate Commerce Commission in Docket No. FF-401, as a surface freight forwarder which authority was issued March 13, 1973, and has been in force and effect since that time, and therefore the defendant, was at all material times, a freight forwarder subject to the visitorial and inspection provisions of Section 412(d) of the Interstate Commerce Act (Title 49, Section 1012(d), U.S. Code).

That at all times herein mentioned, Louis P. Bussolati was and is employed by the plaintiff, Interstate Commerce Commission, as a duly authorized District Supervisor and Special Agent assigned to plaintiff's New York, New York office, and was and is actively engaged in the performance of the official functions and duties in connection with said employment.

That on January 13, 1975, District Supervisor and Special Agent Bussolati presented himself at Associated's place of business at Jamaica, Queens, New York, during normal working hours identifying himself as a District Supervisor and Special Agent of the Interstate Commerce Commission to defendant's vice-president Louis Santangelo requesting production of defendant's records of air freight

forwarding operations into Minneapolis, Minnesota. Mr. Bussolati was accompanied by Transportation Rate and Tariff Specialist Thomas A. Stanco also of plaintiff's New York City office. Mr. Santangelo allowed them to visually inspect air freight forwarding bills of lading and records of payment to motor carrier related to operations in and around Minneapolis, Minnesota. Messrs. Bussolati and Stanco then asked for permission to make copies of those documents because they wished to study them for an extensive period. Mr. Santangelo excused himself for a few minutes and on his return he stated that Associated's president Norman Freeman would not allow them access to Associated's files. Mr. Bussolati told Mr. Santangelo that he had a right to inspect Associated's records referring to Associated's freight forwarder permit. Mr. Bussolati displayed his credential to Mr. Santangelo and asked him to read it. Mr. Santangelo looked at the credential whereupon Mr. Bussolati asked to speak to president Freeman. Mr. Santangelo left the room returning in a few minutes and stated that Mr. Freeman, "Feels we are doing nothing wrong," and that they could not have access to Associated's files nor copy any documents. Mr. Santangelo was urged to reconsider but remained firm saying that Mr. Freeman, "Did not want Associated's records up for grabs."

4. Mr. Bussolati prepared an inspection demand letter and gave it to Mr. Santangelo. Mr. Santangelo again left the room, returned, and repeated his earlier refusal. The next day, January 14, 1975, Supervisor Bussolati mailed to Associated a formal demand letter quoting Section 412(d) of the Interstate Commerce Act which sets forth plaintiff's visitorial authority in relation to freight forwarders and set an

appointment for 9 A.M. on January 20, 1975. On January 16, 1975, Mr. Bussolati returned a telephone call of Mr. Santangelo who asked for a postponement of the January 20, 1975, date so that legal counsel could be present. Supervisor Bussolati suggested that Mr. Santangelo call Assistant Regional Director Lorusso of plaintiff's New York City office. The appointment was postponed by mutual agreement between Mr. Lorusso and Mr. Santangelo.

5. On January 20, 1975, president Freeman mailed a letter to Assistant Regional Director Lorusso wherein he stated that Associated does not allow access to air freight forwarder documents and records except to the CAB, and that Associated documents could be examined by contacting the Terminal Manager at the origin terminal of any specifically identified shipment and listed the name, address, and telephone number of Associated's nine (9) terminals throughout the country. Mr. Freeman concluded his letter by stating that plaintiff's agents were abusive and threatening. On January 30, 1975, plaintiff's Assistant Regional Director Lorusso went to Associated's office at Jamaica, Queens, and spoke to president Norman Freeman. Mr. Lorusso asked Mr. Freeman to permit inspection of Associated's files because Associated has an ICC Freight Forwarder Permit. Mr. Freeman said that Associated was not refusing to permit the Interstate Commerce Commission to make an inspection but that because Associated was not performing any operations under its ICC Freight Forwarder permit, Associated had no records available for inspection. Nor further contacts or demands have been made by plaintiff since subsequent to the January 30, 1975, visit by Assistant Regional Director Lorusso.

6 That the plaintiff is informed and believes and therefore alleges, that unless restrained by this Court, defendant, Associated, intends to and will in the manner and form aforesaid, or otherwise, continue to fail and refuse to submit its accounts, books, records, memoranda, coorespondence, and other documents of said defendant to duly authorized representatives of the Commission upon the demand and display of proper credentials as aforesaid.

7 That the acts of the defendant, Associated, constitute violations of Section 412(d) of the Interstate Commerce Act (Title 49, Section 1012(d), U.S. Code) and, as such are subject to be enjoined by this Court upon the application and suit of plaintiff as aforesaid, under the express provisions of said Act, more particularly Section 417(b)(1) thereof, (Section 1017(b)(1) Title 49, U.S. Code).

WHEREFORE, Plaintiff, prays judgement as follows:

(a) That the defendant, Associated, a corporation, its agents, employees, representatives, and those persons acting under its supervision or control, be perpetually enjoined and restrained, from in any manner or by any device directly or indirectly, failing or refusing to submit any and all of its accounts, books, records, memoranda, correspondence, and other documents, to the plaintiff, or its duly authorized Special Agents, Accountants, or Examiners during normal business hours for their inspection, examination, and copying upon demand and display of proper credentials while it holds authority as a freight forwarder subject to the Interstate Commerce Act;

(b). That a preliminary injunction be issued herein, enjoining and restraining the said defendant, and said other persons, from doing any of the acts complained of herein during the pendency of this suit;

(c). That the plaintiff have such other and further relief as justice and equity may require.

John F. Corley
JOHN F. CORLEY
STUART B. ROBBINS
ATTORNEYS FOR PLAINTIFF
INTERSTATE COMMERCE COMMISSION
BUREAU OF ENFORCEMENT
26 FEDERAL PLAZA, ROOM 1807
NEW YORK, NEW YORK 10007
Tele. No. - (212) 264-1072

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

LOUIS P. BUSSOLATI, being first duly sworn, upon oath,
deposes and says:

That he is an employee of the United States Government,
to wit, a Special Agent and District Supervisor for the
Bureau of Operations, Interstate Commerce Commission, with
headquarters at New York, New York that as such Special
Agent and District Supervisor he made an investigation of
the matters set forth in the above and foregoing Complaint;
that he has read the above and foregoing Complaint; and
that the matters set forth therein are true except such matters
that are alleged upon information and belief, and this he
verily believes to be true.

Louis P. Bussolati
LOUIS P. BUSSOLATI

Subscribed and sworn to before me this 21st day of
July, 1975.

Marie C. DiGiulio 7-21-75
NOTARY PUBLIC DATE

My Commission Expires:

MARIE C. DIGIULIO
Notary Public, State of New York
No. 02-4523166
Qualified in Bronx County
Commission Expires March 30, 1976

(SEAL)

MOTION TO DISMISS
OF DEFENDANT - APPELLANT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----x
INTERSTATE COMMERCE COMMISSION,

Plaintiff,

- against -

ASSOCIATED AIR FREIGHT, INC.,

Defendant.
-----x

Civil Action
File No. 75C1221

NOTICE OF MOTION
(Assigned to Jack B.
Weinstein, Judge)

S I R S :

PLEASE TAKE NOTICE, that the undersigned will bring the annexed motion on for a hearing before this Court at Courtroom 10, 6th Floor of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 26th day of September, 1975 at 10 A.M. or as soon thereafter as counsel can be heard.

Dated: New York, New York
September 18, 1975

FRACKMAN & ZALMAN

By: 

Benjamin Zalman, A Member
of the Firm

Attorneys for Defendant
Office & P.O. Address
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(212) 432-1222

GROVE, JASKIEWICZ, GILLIAM & COBERT
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1730 M Street, N.W.
Suite 501
Washington, D.C. 20036

TO: JOHN F. CURLEY, ESQ.
Attorney for
INTERSTATE COMMERCE
COMMISSION
26 Federal Plaza

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,)	
)	
Plaintiff)	
v.)	No. 75C-1221
)	
ASSOCIATED AIR FREIGHT, INC.,)	
)	
Defendant.)	

MOTION OF DEFENDANT
TO DISMISS

Comes now Associated Air Freight, Inc., Defendant in the above-captioned proceeding, by its attorneys, and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure files this Motion to Dismiss the Complaint of plaintiff on the ground that this Court has no jurisdiction over the subject matter of this action, or in the alternative, that the Complaint fails to state a claim upon which relief can be granted.

Paragraphs I and II of the Complaint invoke the jurisdiction of the Court under Sections 412(d) and 417(b)(1) of Part IV of the Interstate Commerce Act [49 U.S.C. §1012(d) and §1017(b)(1)]. Notwithstanding such action, the facts alleged

in the Complaint do not bring the subject matter within the jurisdiction of this Court and do not state a claim upon which relief may be granted.

Respectfully submitted,

ASSOCIATED AIR FREIGHT, INC.

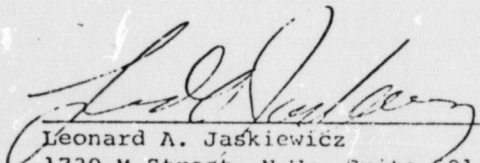
Of Counsel:

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IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,)	
)	
Plaintiff)	
v.)	No. 75-C-1221
)	
ASSOCIATED AIR FREIGHT, INC.,)	
)	
Defendant.)	
)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

I.

THE COMPLAINT FAILS TO
ALLEGE A VIOLATION OF
ANY PROVISION OF THE
INTERSTATE COMMERCE ACT

Section 417(b)(1) provides, in pertinent part, as follows:

If any freight forwarder fails to comply with or operates in violation of any provision of the chapter, or any . . . order thereunder. . . , the Commission . . . may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such provision . . . ; and such court shall have jurisdiction to enforce obedience thereto by a writ or writs of injunction

The Complaint, in this proceeding does not allege facts which constitute a violation of Section 412(d) or any other provision to the involved chapter. This Court, therefore, has no jurisdiction under Section 417(b)(1).

Section 412(d) provides, in pertinent part, as follows:

The Commission or its duly authorized special agents, accountants, or examiners . . . shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and all other documents of freight forwarders . . . (Emphasis added).

The term "freight forwarder" is defined in Section 402(5) of the Interstate Commerce Act [49 U.S.C. §1002(5)] which provides that in order to qualify as a freight forwarder a person must hold itself out to the general public as a common carrier which "utilizes for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title." Chapters 1, 8, and 12 are the provisions for regulation of railroads and pipelines (49 U.S.C. §1, et seq.), motor carriers (49 U.S.C. §301, et seq.) and water carriers (49 U.S.C. §901, et seq.).

The Complaint alleges no facts upon which this Court can reasonably conclude that Defendant has denied Plaintiff access to records of a freight forwarder under the jurisdiction of the Commission. At pages 2 and 3 of the Complaint, Plaintiff admits that Special Agent Bussolati did not seek access to records of a surface freight forwarder as defined by the Commission, but rather that the Defendants' vice president was requested to produce records of "air freight forwarding operations into Minneapolis, Minnesota."

Further, it is clear from page 4 of the Complaint that the Plaintiff was aware that Defendant was not performing any operations under its surface freight forwarding permit and therefore had no records which were required to be kept under Sections §412 of the Act (49 U.S.C. §1012).

On its face, the Complaint fails to allege facts which constitute a violation of Section 412(d) or any other section of Part IV of the Interstate Commerce Act. As a result the jurisdiction of this Court cannot be invoked under Section 417 (b) (1).

II.

AN ADMINISTRATIVE AGENCY'S
INSPECTION POWERS DO NOT
EXTEND TO RECORDS NOT REQUIRED
BY THE APPROPRIATE ACT

The decisions of the Supreme Court of the United States and other Federal courts have consistently held that an administrative agency's power of inspection does not extend to records which are not required by the appropriate Act.

When Part IV of the Interstate Commerce Act relating to the regulation of freight forwarders was enacted in 1942, Section 412(d) was taken from the similar provision relative to railroads and pipelines in Section 20(5) [49 U.S.C. §20(5)]. Section 20(5) has been interpreted very narrowly by the Supreme Court in United States v. Louisville & Nashville Railroad Company, 236 U.S. 318 (1915). At that time, Sec. 20 authorized the Commission to inspect only accounts, records and memoranda.

The Court held that the Commission was not authorized to inspect correspondence. The Court held that the purpose of Section 20 was to establish a uniform system of accounts and bookkeeping and not to grant unlimited powers of inspection. 236 U.S. at 335-336.

Section 20 has subsequently been amended to include correspondence within the powers of Commission inspection. However, the Courts have continued to give Section 20 and similar inspection provisions a narrow construction. In United States v. Clyde S.S. Co., 36 F. 2d 691 (2nd Cir. 1929), the Court upheld the Commission's right to examine only records which would indicate activities that would bring the defendant steamship company within the regulation of the Commission. However, in the present proceeding, Plaintiff has not requested access or even alleged the existence of records which are related to the regulatory function of the Interstate Commerce Commission.

Section 20(5) was recently considered in Burlington Northern, Inc. v. I.C.C., 462 F. 2d ²⁸⁰ (D.C. Cir. 1972). ^{ent. Dec. 459 U.S. 891} In that proceeding the Commission sought inspection of certain budget forecasts, including cash flow and income forecasts. The railroad sought a declaration of its rights and an injunction against the Commission's formal demand for such records. The Court of Appeals affirmed the District Court's grant of the railroad's motion for summary judgment and dismissal of the Commission's counterclaim. After discussion of the Louisville & Nashville decision and the legislative history of Section 20, the Court

in Burlington Northern, Inc., concluded that the present Section 20 was to be interpreted narrowly:

From this analysis of the history of Section 20 we conclude that the Supreme Court's narrow construction of the purpose of the section is still controlling despite the 1920 and 1940 amendments. The purpose is to maintain a uniform accounting system and to permit the analysis and interpretation of records which are required to be kept by carriers. The Commission's access to memoranda and other materials in the possession of carriers must therefore be confined to circumstances in which the need for information relating to or explanatory of required accounting and bookkeeping entries is evidenced. 462 F. 2d at 287-88 (Emphasis added).

On the facts alleged in the Complaint, the Plaintiff has not been denied access to any documents pertaining to records which Defendant is required to keep under the Interstate Commerce Act. Denial to the Commission of inspection rights in this proceeding is even more compelling since the Civil Aeronautics Board (CAB) has the power of inspection of these records pursuant to Section 407 of the Federal Aviation Act (49 U.S.C. §1307). This inspection provision relating to the regulation of air freight forwarders by the CAB contains language almost identical to the language of Section 20(5) and 412(d). The records sought by the plaintiff are subject to the inspection of the agency charged with protecting the public's interest by regulation of air freight forwarders. To subject these same records to the inspection of the Interstate Commerce

Commission is an expense and burden that is clearly beyond the intent of Congress in enacting Section 412(d).

The Burlington decision was recently followed by Judge McLaren of the Northern District of Illinois in Civil Aeronautics Board v. United Airlines, Inc., No. 75-C-1216 (N.D. Ill. Sept. 5, 1975) in interpreting the similar inspection provisions applicable to the CAB [49 U.S.C. §1377(e)]. In that proceeding the CAB sought access to all documents on United's premises. Later the CAB amended this request to include only reading files, subject matter files, expense reports, and memoranda. The reading files consisted of copies of all correspondence of whatever nature, arranged chronologically, generated by United's offices and departments.

In granting United's motion to dismiss the Court stated:

United contends that this language must be read in light of the entire section of the statute that requires that certain types of records be kept and that documents related to them or utilized in developing them be made available

The Court believes that proper rules of construction require that the statute be read as a whole, and in that light, it is clear that the records or documents "required to be kept or kept" refers to documents in the specific categories of records the CAB requires and supporting documents. It seems unlikely that Congress would grant the CAB so important a right as a plenary power to search a company's files, albeit a highly regulated company, in a subparagraph of a section which

requires that certain specified records be maintained. Nor does the legislative history of the statute reveal any such intent by Congress. (Memorandum Opinion and Order, p. 7-8 1/)

The circumstances in United Airlines are virtually on "all fours" to the circumstances here involving Section 412(d). Section 412(d) authorizes the Commission to inspect and examine the records of a surface freight forwarder. It is unlikely that Congress meant to give the ICC power to embark on a "fishing" expedition into all aspects of a diversified company simply because that company holds a freight forwarder permit from the ICC.

Further, the Congressional intent not to grant a broad power of inspection is evident from the provisions providing for formal investigation proceedings before the Commission. [See Sections 12 and 17, 49 U.S.C. §§12 and 17.] Formal investigations by the Commission require the Commission to observe certain procedural protections in the production of evidence. To allow the ICC to conduct a complete investigation through the inspection provision of 412(d) would make the formal investigation provisions and procedural requirements meaningless. It should be emphasized that the plaintiff is not seeking the Court's aid in upholding its subpoena power. Plaintiffs'

1/

A copy of the complete opinion is attached for the convenience of the Court.

powers of inspection pursuant to 412(d) were not meant to be co-equal with the Commission's subpoena power.

Clearly, the Congressional intent in enacting the inspection provisions as interpreted by the foregoing decisions demonstrates beyond cavil that the Complaint alleges no facts which constitute a violation of Section 412(d). Thus, the Complaint fails to state a claim upon which relief can be granted. Further, because the Complaint alleges no violation of any other provision of the Act, no jurisdiction over the subject matter rests in this Honorable Court.

III.

THE CONGRESSIONAL SCHEME
OF REGULATION OF TRANS-
PORTATION CONTEMPLATES
EXCLUSIVE POWER IN THE
CAB FOR INSPECTION OF AIR
FREIGHT FORWARDER RECORDS

As stated above, the records sought by the Plaintiff are subject to the inspection of the CAB pursuant to Section 407 of the Federal Aviation Act (49 U.S.C. §1307). Congress did not intend to place an onerous burden on defendant by subjecting the same records to the inspection and examination privileges of two agencies. The Congressional scheme of regulation contemplates that each administrative agency is to have complete sovereignty within a given area and that interagency conflict is to be avoided. Law Motor Freight, Inc. v. CAB, 364 F. 2d 139, 145 (1st Cir. 1966).

Congressional regulation of freight forwarders explicitly recognize this sovereignty. Section 203(b)(7a) of the Interstate Commerce Act [49 U.S.C. §303(b)(7a)] provides that the ICC shall have no jurisdiction over transportation "incidental to transportation by aircraft." With regard to freight forwarding activities Section 402(a)(7) [49 U.S.C. §1002(a)(7)] provides as follows:

The term "service subject to this chapter" means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder. . . .; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to the Civil Aeronautics Act of 1938, as amended, are utilized or for the performance of which transportation by motor vehicle exempted under the provisions of section 303(b)(7a) of this title is utilized.

Further, the Interstate Commerce Commission itself has recognized that the CAB is to have sovereignty within its sphere of regulation. Consequently, the Interstate Commerce Commission has adopted rules that recognize this area of sovereignty. 49 C.F.R. 210.40 and 49 C.F.R. 404. See Emery Air Freight Corp. Freight Forwarding Applic., 339 I.C.C. 17, 28-29 (1971).

To allow Plaintiff access to Defendant's air freight forwarding records is a direct encroachment on the independence and sovereignty that Congress intended the CAB to have.

IV.

A STATUTE SHOULD NOT BE CONSTRUED
IN SUCH A MANNER AS TO RAISE A
SERIOUS CONSTITUTION ISSUE

As early as 1894, the Supreme Court recognized that there are some constitutional limitations on the investigatory powers of the ICC. In Interstate Commerce Commission v. W. G. Brimson, 154 U.S. 447 (1894), the Supreme Court upheld the constitutionality of the Commission's subpoena powers but recognized that evidence sought must be material to the Commission's investigatory power.

Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizens. 153 U.S. at 478.

The Commission itself has previously admitted that it does not have a general right to search the affairs and records pursuant to the inspection provision of Section 220(b) [49 U.S.C. §320(d)]. Cooper's Express, Inc. v. I.C.C., 330 F. 2d 338, 340 (1st Cir. 1964). The Court, in the Cooper proceeding, also recognized limitations on the Commission's powers of inspection.

The Commission itself is limited by the standard of reasonableness. The inspection must be related to the Commission's function as a regulator (330 F. 2d at 34).

On the facts alleged in the instant Complaint the records sought fit well within the records and documents which are not relevant to a lawful activity of the Commission as anticipated by the Court in that proceeding.

In an action involving the Federal Trade Commission's power of investigation, the Court stated that a court should not construe a statute so as to raise a serious question of constitutional law. Mr. Justice Holmes, speaking for the Court in Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924), recognized that the 4th Amendment prohibition against unreasonable searches and seizures, placed a limitation on the inspection powers of a federal agency.

Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U.S. 447, 479, 38 L. ed. 1047, 1058, 111), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.

. . .

We cannot attribute to Congress an intent to come so near to doing as to raise a serious question of constitutional law. 264 U.S. at 305-307 (Citations omitted).

The right of an agency to require certain records to be kept and to be inspected without violating the 4th Amendment has to be recognized. See C.A.B. v. United Airlines, Inc., supra, and cases cited therein, p. 10. But the request of the

agency in the instant proceeding is so broad in nature that a serious constitutional question would be raised if the agency is allowed to inspect the requested documents.

V.

CONCLUSION AND PRAYER

The foregoing demonstrates that the Complaint fails to allege facts which constitute a violation of Section 412(d) of the Interstate Commerce Act [49 U.S.C. §1012(d)] or any other provision of the Interstate Commerce Act. The inspection provisions applicable to the Interstate Commerce Commission have consistently been interpreted narrowly, so as to preclude inspection of records not relevant to the agency's regulatory function. Further it has been demonstrated that the Congressional scheme of regulation was designed to give the CAB exclusive jurisdiction over air freight forwarding records. Because the Complaint fails to allege facts which constitute a violation, it fails to state a claim upon which relief can be granted. Moreover, the jurisdiction of this Court cannot be invoked pursuant to Section 417(b)(1) of the Interstate Commerce Act [49 U.S.C. 1017(b)(1)]. Finally, to construe the inspection

provision of Section 412(d) to include the records sought by Plaintiff would raise a serious constitutional question under the 4th Amendment.

Respectfully submitted,

ASSOCIATED AIR FREIGHT, INC.

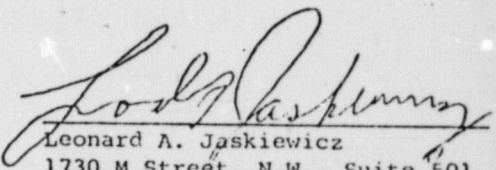
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL AERONAUTICS BOARD,)
)
Plaintiff,)
)
v.) No. 75 C 1216
)
UNITED AIRLINES, INC.,)
)
Defendant.)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the cross motions of the plaintiff, Civil Aeronautics Board (CAB) and the defendant, United Airlines, Inc. (United), for summary judgment. For the reasons set forth below, the CAB's motion is denied, United's is granted and the case will be dismissed.

This is an action by the CAB, brought under 49 U.S.C. §1487 and 28 U.S.C. §1345, for injunctive relief. The CAB, pursuant to 49 U.S.C. §1377(e) and Part 204 of the Economic Regulations of the CAB (E-17(c))

1/ 49 U.S.C. §1377(e), as amended on January 3, 1971, provides:

"Inspection of property and accounts
"(c) The Board shall at all times have access to all lands, buildings, and equipment of any air carrier or foreign air carrier and to all accounts, records, or documents, including all documents, papers, and correspondence, now or hereafter existing, and kept or to be kept by air carriers, for ion air carriers, or their agents and it may employ special agents or auditors, who

14 C.F.R. §240.2,^{2/} seeks to inspect certain documents kept by United. United has refused the requested inspection. After this action was filed, the parties entered into an agreement preserving the records until this Court's decision.^{3/} The parties have also entered into a factual stipulation upon which the instant motions are based. This opinion shall constitute the Court's finding of fact and conclusion of law pursuant to Fed.R.Civ.P. 52(a).

The basic, uncontroverted facts are relatively simple. In April 1975, CAB inspectors, with proper credentials, went to United's executive offices and demanded access to United's files. After several encounters which are not material here, United denied the inspectors access. The CAB then brought this action, originally inter alia, seeking "immediate and unconditional access to all lands, buildings and equipment of United, and accounts, memoranda, correspondence, records, reports and documents kept by United." This request was for all

shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memorandums. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this chapter, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5(5) of this title.

^{2/} See Appendix A.

^{3/} This stipulation is hereby incorporated by reference. Certain segments of the stipulation will be repeated here in the narrative form.

documents located on United's premises. This request, sought to be enforced by injunction, is now limited to the following: ^{4/} (a) Documents -- reading files, ^{5/} subject matter files, ^{6/} expense reports, ^{7/} and memoranda; (b) Departments or Offices -- Finance and Planning, Law, External Affairs, Marketing, Chairman and Vice Chairman.

^{4/} The CAB inspectors limited their request after their initial contact with United to those items mentioned *infra*. The parties are in some dispute as to whether the broad request is before the Court. The Court believes that it should not render an advisory opinion. See *Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1796), as to the entire scope of the statute, but will decide the question before it, i.e., whether the modified request should be complied with. See also *California Bankers Ass'n v. Shultz*, ___ U.S. ___, 94 S.Ct. 1498 at 1519 (1974).

^{5/} Reading files consist of copies of all correspondence of whatever nature, arranged chronologically, generated by United's offices and departments.

^{6/} Subject matter files consist of correspondence, memoranda, studies, reports and other materials dealing with specific matters.

^{7/} United has agreed to provide these.

United makes several substantive contentions in opposition to the request for access. First, United contends that section 407(c) should be interpreted to permit inspection of only those documents kept pursuant to CAB regulations, reports United is required to make to the CAB and supporting or related documents. United further contends that the scope of documents which can be reviewed under §407(c) does not include: (1) materials maintained by United relating solely to United's parent, subsidiary or affiliated corporations; (2) documents relating to United's officers' or employees' positions on boards of directors of unaffiliated corporations and those corporations' activities; (3) documents relating to employees' or officers' personal affairs; or (4) documents relating to national security.^{B/}

B/ No mention is made in the briefs of this issue. The Court believes that if certain documents are to be protected for national security reasons, the agency of government to which those documents relate should so certify to the CAB and United and then the departments of government can resolve the issue. The privilege of national security, to the extent it exists, see United States v. Nixon, U.S., 94 S.Ct. 3090 (1974), is the government's and United can only claim it as an agent or conduit for a governmental agency.

United next contends that if the interpretation of §407(c) is as broad as claimed by the CAB, then §407(c) and the demand pursuant to it constitute an unreasonable search in violation of the Fourth Amendment of the Constitution. United also contends that allowing complete access without reasons for the requests violates the due process clause of the Fifth Amendment in that proper notice is not provided. Finally, United contends that the attorney-client privilege protects certain documents from discovery.

The CAB, an agency of the United States, is charged, inter alia, with the regulation of foreign and domestic air transportation in the interests of the United States. It seeks to foster sound economic conditions in the industry and provide economical, efficient and adequate air transportation services. See 49 U.S.C. §1302. The CAB, further, controls competition in the industry and provides companies engaged in air transportation with many economic benefits. See, e.g., Hughes Tool Co. v. TransWorld Airlines, Inc., 409 U.S. 353 (1973). The CAB is authorized to fulfill its statutory obligations by requiring various records to be kept, by conducting audits and other procedures. See 49 U.S.C. §§ 1305, 1482(b).

United, a Delaware corporation, holds licenses issued by the CAB and is an authorized common carrier. It is also "the free world's largest airline." It operates in an insulated environment and receives benefits bestowed upon it by the government. See 49 U.S.C. §§ 1364, 1376, 1379, 1382. In exchange for these benefits, United has obligations, such as route and fee restrictions, and service requirements. See 49 U.S.C. §§ 1371, 1373, 1374. One other requirement is to keep certain books and records and to allow access to these. See 49 U.S.C. § 1377(a)-(d). The question involved is the extent of access to documents to be allowed.

The statute at issue here, 49 U.S.C. § 1377(e), provides that the CAB shall have access to the premises of carriers and "to all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept" (emphasis added) The CAB contends that this language allows them access to all papers on United's premises, and more particularly, to all papers within their modified request. United contends that this language must be read in light of the entire section of the statute that requires that certain types of records be kept and that documents related to them or utilized in developing

them be made available. United's record keeping system does not segregate these required records; nor does United deny that the CAB should have access to these types of records.^{9/}

The Court believes that proper rules of construction require that the statute be read as a whole, and in that light, it is clear that the records or documents "required to be kept or kept" refers to documents in the specific categories of records the CAB requires and supporting documents. It seems unlikely that Congress would grant the CAB so important a right as a plenary power to search a company's files, albeit a highly regulated company, in a subparagraph of a section which requires

^{9/} Not raised, or decided, here is the question of what records, or file system, Congress or the CAB might require, e.g., a carrier's parent's or subsidiary's activities, officers' positions or other boards of directors or employees' personal affairs. See *California Public Employees' Ass'n v. Shultz*, U.S. , 94 F.Ct. 1494, 1517-20 (1974); *United States v. Boston's Bell Co.*, 338 U.S. 632, 651-52 (1950); *Commodore v. United States*, 100 F.2d 338 (1st Cir. 1964); cf. *United States ex. Rel. Terraciano v. Fontaine*, 493 F.2d 662 (2d Cir. 1974).

that certain specified records be maintained. Nor does the legislative history of the statute reveal any such intent by Congress.

The CAB contends, however, that just such a purpose was evidenced by the recent amendments which include ticket agents and foreign carriers in the category of persons whose records were available. This contention does not adequately reflect Congress' purpose, which was, inter alia, to prevent special relations or deals on ticket prices. This purpose was to be enforced by allowing for the cross-checking of records which were already required to be kept. See 1974 U.S. Cong. & Admin. News, at 7466-67.

The CAB also contends that the decision in CAB v. Blatz Airlines, Inc., Civ. No. 13821-61-5 (S.D. Cal. 1962), supports its position. Blatz is inapposite, however, since the CAB in that case requested specific documents which were required by the CAB to be kept. Blatz did not involve a search through an entire file system.

CAB v. Hermann, 353 U.S. 322 (1957) does not provide solace for the CAB either. In Hermann, the Supreme Court enforced a subpoena for specific documents which were required for a lawful CAB investigation. The

instant case therefore materially differs from the situation in Herrmann.

Also, for certain violations formal investigation with subpoenas can be initiated. See 14 C.F.R. 55395 et seq. It would be difficult to impute to Congress an intent to provide a formal proceeding for investigation and then to allow the CAB to conduct a complete investigation in derogation of the requirements and protections afforded by the formal procedure. Such an inconsistency should not be lightly allowed.

An analogy can be drawn to the Interstate Commerce Act which allows the Interstate Commerce Commission to require and have access to certain documents. See 49 U.S.C. §320(d) ("§20"). The District of Columbia Circuit Court of Appeals recently held that act provides no plenary right of search, but that the statute allows disclosure only of the records required to be kept or the supporting documents to those records. See Burlington Northern, Inc. v. ICC, 462 F.2d 280 (D.C.Cir.), cert. denied, 409 U.S. 899 (1972). In Burlington, the Court reviewed the history of §20. It noted that a right to inspect correspondence related to required records was found not to exist in an earlier version of §20 by the Supreme Court in United States v.

Louisville & Nashville R.R., 236 U.S. 318 (1915). After Louisville & Nashville, Congress amended §20 to include correspondence. The Court in Burlington, however, narrowly construed the amended §20 to allow for inspection of only those documents and correspondence required to be kept or related thereto. In another case, the ICC admitted that it had no general right to search under §20. See Cooper's Express, Inc. v. ICC, 330 F.2d 338, 340 (1st Cir. 1964). It should be noted that §20 closely parallels the statute at issue here and that the ICC was a model for other transportation regulatory agencies.

Finally, a court should not construe a statute in such a manner as to raise a serious constitutional issue. Agencies can require certain records to be kept and to be inspected without violating the Fourth Amendment. See, e.g., United States v. Binwell, 466 U.S. 301 (1974); Colomado Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Horton Selt Co., supra. However, a serious constitutional question is raised as to an agency's right to inspect all documents in a company's possession. Compare Binwell, supra; Colomado, supra; Horton Selt, supra; with Casper v. Medicinal Corp., 357 U.S. 523 (1957); See v. City of Seattle, 387 U.S. 511 (1967); see also ICC v. American Tobacco Co., 264 U.S. 258 (1924).

For all of the above reasons, the Court believes it should interpret §407(c) narrowly. Under §407(c), the CAB is only permitted access to documents required to be kept or those documents kept which relate to the required records. Therefore, the Court finds for United and will grant its motion.

In light of the result reached, it is unnecessary to consider the parties' contentions concerning the applicability or non-applicability of United's claim of privilege.

IT IS SO ORDERED.

ENTERED:

United States District Judge

DATED: September 5, 1975

Argentina: The provisions of this Part 210
 Final order are: 204, 4-7, 201, 72 Stat.
 563; 40 U.S.C. 170, 197, 191.

[illegible]

(b) The term "independent" and "affiliate" are construed to mean any employee of the Union, the Independent and any other employee of the Board specifically designated by the Director, Office of Labor Relations and Operations.

get The change in the board not only better of an identification card and credential, to each employee shall be confined to the order and direction of the Board to such individuals to inspect and to maintain, handling, equipment, records, records, and maintenance of aircraft in accordance with the terms of section 174 (c).

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This is to certify that

[photo] A close-up of a person's face, looking down, with a somber expression.

(Signature) _____

and in rationalism and directed to a return to the culture of nature. In accordance with the laws of the physical sciences and against those of metaphysics, it is his authority and he is called a scientist.

By authority of the Civil Administration
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Section
Old documents: Vol. 1

End of 1993

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The 10 pages of the statement listed the battle time experiences of the soldier and the results of the post-1945 GI Bill program. Based on such firsthand experience, the author stated that the GI Bill was a "genuine success" and that it "helped to build the postwar life of the American people."

From the above, it is seen that the
following are the results of the

U.S. DEPARTMENT OF JUSTICE
CRIMINAL JUSTICE DIVISION
WASHINGTON, D.C. 20535

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§ 210. "Circuit Court."

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REPLY TO MOTION

TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,
Plaintiff,
v.
ASSOCIATED AIR FREIGHT, INC.,
Defendant.

No. 75 C 1221
JACK B. WEINSTEIN, JUDGE

PLAINTIFF'S REPLY TO DEFENDANT'S
MOTION TO DISMISS

Comes now the plaintiff, Interstate Commerce Commission, in the above entitled matter and submits its Reply to Defendant's Motion to Dismiss.

Plaintiff's Complaint (Count I) explicitly alleges defendant to be a surface freight forwarder and the holder of a Permit issued by plaintiff to defendant on March 13, 1973. Copy of this Permit is attached hereto and marked Exhibit "A". Plaintiff's Complaint also alleges in its Count I that as the holder of such Permit, defendant is therefore subject to the visitorial and inspection provisions of Section 412(d) of the Interstate Commerce Act, (Title 49, U.S. Code 1012(d)). Plaintiff further alleges in its Complaint that defendant wrongfully refused to permit examination and copying of its records, and that said described wrongful refusals are subject to be enjoined by this Court under the provisions of Section 417(b)(1) of the Interstate Commerce Act (Title 49, U.S. Code 1017(b)(1)). It is difficult to imagine a more clear jurisdictional statement and claim upon which relief may be granted by this Court.

The statute which provides for inspection and copying by plaintiff of defendant's accounts, books, records, etc.,

(Title 49, U.S. Code 1012(d)) reads as follows:

"The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of freight forwarders; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of freight forwarders and of associations (as defined in this section), and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any freight forwarder, as the Commission deems relevant to such person's relation to or transactions with such freight forwarder. Freight forwarders and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this subsection, and freight forwarders shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials."

Jurisdiction to grant the relief sought is specifically conferred on this Court by Title 49, U.S. Code 1017(b)(1) which provides as follows:

"If any freight forwarder fails to comply with or operates in violation of any provision of this part, or any rule, regulation, requirement, or order thereunder, or of any term or condition of any permit, the Commission or the Attorney General of the United States (or, in case of such an order, any party injured by the failure to comply therewith or by the violation thereof) may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such provision of this part or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ or writs of injunction or other process, mandatory or otherwise, restraining such freight forwarder and any officer, agent, employee, or representative thereof from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition, and enjoining obedience thereto."

It is therefore clear that defendant, a freight forwarder licensed by plaintiff, is subject to the authority of plaintiff to submit for examination and copying all of defendant's

accounts, books, records, memoranda, correspondence, and other documents as provided for by the empowering statute above recited. Plaintiff's Complaint alleges that defendant is a surface freight forwarder and that its refusal to permit an examination of its records constitutes a violation of Section 412(d) of the Act which violation is subject to be enjoined by this Court under the authority of Section 417(b)(1) of the Act. Plaintiff's Complaint therefore alleges every element necessary to form a basis for the relief asked. New Home Appliance Center v. Thompson, 250 F. 2d 881 (C.A. Colorado 1957). On a motion to dismiss for failure to state a claim for relief, plaintiff's allegations must be taken as true. Sam S. Goldstein Industries, Inc., v. Botany Industries, Inc., 301 F. Supp. 728 (D.C. N.Y. 1969), and Commerce Reporting Co. v. Puretec, Inc., 290 F. Supp. 715 (D.C. N.Y. 1968).

Defendant claims that plaintiff's Complaint alleges that its employees only requested production of defendant's "air freight forwarding operations into Minneapolis, Minnesota". In point of fact, plaintiff's Complaint alleges that on January 13, 1975, defendant unlawfully refused to permit examination and copying of 1). "air freight forwarding operations into Minneapolis, Minnesota"; 2). "air freight forwarding bills of lading and records of payment to motor carrier/s/ related to operations in and around Minneapolis, Minnesota"; 3). "Associated's records referring to Associated's freight forwarder Permit". The Complaint also alleges that plaintiff's employee Bussolati, also on January 13, 1975, prepared an inspection demand letter and gave it to defendant's vice president Louis Santangelo. That letter demands access to defendant's "Transportation Records", and copy of that letter

is attached and marked Exhibit "B". While plaintiff does not concede that it is not entitled to examination of defendant's air freight forwarding records, it is nevertheless clear that plaintiff's demand for records was not limited to defendant's air freight forwarding records but also included other records which indisputably should have been made available to plaintiff's examination.

The distinction made by defendant's motion between air forwarding records and surface forwarding records is meaningless in the face of the broad language of the empowering statute which states that all accounts, books, records, etc., must be made available to plaintiff. The statute goes on to provide that even the records of commonly controlled companies of freight forwarders are subject to production and examination. This means that even if defendant chooses to operate two (2) distinct legal entities, one as an air forwarder and another as a surface forwarder, plaintiff would still be entitled to examine the records of both entities. But both Permits (air and surface) are issued in the name of defendant. Plaintiff's demand to examine all records of defendant is statutorily and constitutionally authorized.

Defendant's motion is also based on the contention that "the Complaint alleges no facts upon which this Court can reasonably conclude that defendant has denied plaintiff access to records of a freight forwarder under the jurisdiction of the Commission". Yet, as the holder of such a surface freight forwarder Permit from plaintiff, defendant is subject to the visitorial provisions of Section 412(d) of the Act and that comprehensive language in no way limits or qualifies plaintiff's right of inspection conditioned first on the showing that the holder of such a Permit was or is in fact exercising its authority under the Permit issued to it. If defendant's con-

tention were correct, a stubborn licensee could hinder or even thwart plaintiff from establishing proof of the various activities of a licensee under plaintiff's jurisdiction, and thus frustrate the regulatory scheme contemplated by Congress. Plainly, such a result is repugnant to and in conflict with the authority of Congress to regulate commerce between the states.

The essence of defendant's position herein is that it claims that it does not conduct any service under its Interstate Commerce Commission Permit and therefore it somehow is under no duty to submit its records to examination as provided for by the statute in question. The defect in this reasoning is that defendant wants to be the sole judge of its own legal status; that is to say, defendant wants to decide for itself whether it acts as a surface forwarder in respect to whether it will submit its records to examination. A similar contention was repudiated by the Court of Appeals in Coopers Express v. I.C.C., 330 F. 2d 338 (1st Cir. 1964), where at page 341 thereof that Court said:

"It /I.C.C./ could not properly perform its duties if the regulated party had the right to say just how far an examination could go."

and it continued:

"***in view of the broad power of regulation of interstate public carriers, it is difficult to conceive of a case in which the Interstate Commerce Commission would be seeking to inspect a record or document which would not be relevant to a lawful activity of the Commission."

In the case at bar, defendant seeks to assert the right to prevent altogether any examination of any of its records founded on the claim that it does not engage in surface forwarding activities.

Defendant's argument and recital of authorities

which go to the merits of the dispute, namely the boundaries of a lawful examination, are premature at this time and wholly inappropriate to a motion to dismiss brought under Rule 12 of the Federal Rules of Civil Procedure. Defendant places great stress on case authorities which relate to propositions not even in point at this juncture. In Burlington Northern, Inc. v. I.C.C., 462 F. 2d 280, (D.C. Cir. 1972), the dispute related to whether the Commission was entitled to budgetary and income forecasts which that Court described as "projections or predictions of future events". In U.S. v. Clyde S.S. Co., 36 F. 2d 691, (2nd Cir. 1929), the Court upheld the Commission's right to examine records of movements which the defendant steamship company claimed did not move in interstate commerce. In that decision, Judge Hand said at page 693, "The Commission could not properly perform its duties if a carrier confessedly within its jurisdiction as a part of its business had the right to say just how far an examination could go." Defendant cites U.S. v. Louisville and Nashville RR Co., 236 U.S. 318 (1915) as support for its position but that case dealt with "correspondence" and was decided prior to Section 20 of Part I of the Act having been amended by Congress so as to authorize access to "correspondence" and such decision is therefore not pertinent to any issue here.

The decision of the Court in C.A.B. v. United Airlines, Inc., decided September 5, 1975, and set forth as an attachment to defendant's motion to dismiss is also not relevant or pertinent to the limited issue now before this Court. There, the Court dealt with the issue of what type of records an airline was required to produce for examination by C.A.B. employees. That dispute revolved around the distinction made by the Court between "records

kept" and "records required to be kept". No such dispute exists in the instant case. Here, defendant has refused access to all its records. It is noted that while there are certain similarities between the visitorial statutes of the C.A.B. and the I.C.C., the latter provision, and the one here dealt with, does not contain the same or a similar clause, namely, "kept or required to be kept" which was the subject of interpretation by the Court in the C.A.B. v. United Airlines, Inc. case. In that decision, the Court also dealt with the difference between a search and an examination. In the instant case, plaintiff's employees made a demand for defendant's records and no search was either made or attempted. Defendant's argument and authorities in support of its motion here under consideration deal with the extent of lawful examination and specific records whereas plaintiff's Complaint alleges defendant to have refused to produce for examination and copying any of its records. It may be that certain of defendant's records, etc., need not be produced but that is not to say that none of defendant's records, etc., need not be produced and this is the basis of defendant's motion to dismiss.

DUAL JURISDICTION FOR THE EXAMINATION
OF RECORDS IS PERMISSABLE

Defendant here contends in effect that should a party be possessed of licenses from two administrative agencies, then only one of those agencies may exercise its examination privileges as granted by law. Not surprisingly, defendant offers no authority to support this novel proposition. While it is true that the C.A.B. has exclusive authority to regulate defendant's air forwarder routes, rates, and so forth, and the I.C.C. has exclusive authority to regulate defendant's surface

forwarder routes, rates, and so forth, this does not mean that the visitorial powers of each is limited by the other and the language of the statute here under consideration is sufficiently broad so as to form a basis for the relief sought. Thus, the authority of plaintiff to examine all of defendant's records in no way can be construed as an encroachment on the jurisdiction of the C.A.B. to regulate defendant's air forwarding business.

Defendant's reliance on Section 402(a)(7) of the Interstate Commerce Act (Title 49, U.S. Code 1002(a)(7) which defines "service subject to this chapter", is misplaced because that provision only distinguishes the difference between the services of a surface forwarder and those of an air forwarder insofar as jurisdiction of the I.C.C. and the C.A.B. with respect to routes, rates, and so forth. The existence of the right vested in the I.C.C. to examine defendant's records can in no way be interpreted as an infringement or encroachment on the C.A.B.'s exclusive jurisdiction to regulate the routes and rates of air forwarders. The authority granted by Congress to both the I.C.C. and the C.A.B., within this frame of reference, are constitutionally compatible.

In I.C.C. v. Goodrich Transit Co., 224 U.S. 194, (1912), the Supreme Court held a carrier subject to the Interstate Commerce Act was required to file reports of the operation of an amusement park which formed no basis of its interstate business, and said:

"If the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts, and whether charges of expense are made against one part of a business which ought to be made against another."

NO SERIOUS CONSTITUTIONAL ISSUE IS RAISED
BY PLAINTIFF'S DEMAND TO EXAM RECORDS

Inasmuch as defendant has refused to produce any records, it is premature at this point to consider whether plaintiff had demanded access to records which are not included in the class of records which are required to be produced.

The records initially sought to be examined related to defendant's use of motor carriers in and around Minneapolis, Minnesota, and this fact is alleged in the Complaint. Title 49, C.F.R. 1221.15 lists the type of records which must be kept by defendant including the period of their retention. Among such required records are Records of Checks (Item 19(c)), Revenue Records (Item 30-32), Voucher Disbursements (Item 40) which records relate to defendant's dealings with motor carriers and irrespective of whether those records pertain to air or surface operations by defendant.

When defendant claimed to plaintiff's employees that defendant was conducting no operations under its I.C.C. Permit, as alleged in the Complaint, this event gave rise to the additional question as to whether defendant was meeting its duty to provide service under its I.C.C. Permit as required by Section 404(a) of the Act (Title 49, U.S. Code 1004(a)). At that point, plaintiff was fully justified in demanding access to defendant's "Transportation Records" so as to determine for itself whether defendant was in fact conducting operations under its Permit with a view towards considering institution of a revocation of that Permit or other remedies as provided for by the Interstate Commerce Act. Obviously, defendant can not lawfully establish itself as the sole judge as to whether its operations are exclusively

that of a air forwarder. Thus, no serious constitutional issue is raised by plaintiff's demand to exam defendant's records.

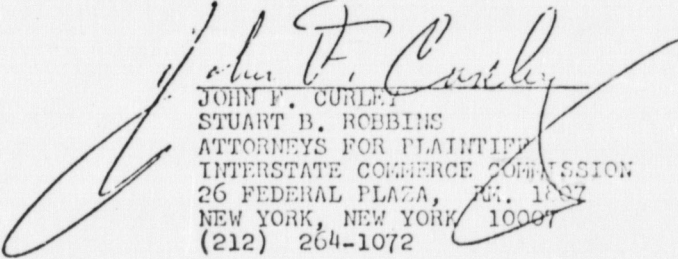
It is well settled that Congress may require a corporation engaged in a business subject to federal regulations to keep certain records and make them available for official inspection in order to provide for effective administration and enforcement. Cooper's Express v. I.C.C. Supra. Shapiro v. U.S., 335 U.S. 1, (1948); U.S. v. Darby, 312 U.S. 100, 1941); Wilson v. U.S., 221 U.S. 361, (1911). Such records assume the characteristic of quasi-public documents and their disclosure may be compelled without violating the Fourth Amendment. Bowles v. Glick Bros. Lumber Co., 146 F. 2d 566 (9th Cir.), cert. denied, 326 U.S. 804, (1945); Rodgers v. U.S., 138 F. 2d 992, (6th Cir. 1943).

Parallel sections of the Interstate Commerce Act dealing with railroads (Part I) and motor carriers (Part II) were examined by the Courts and found to be constitutional within the meaning of the Fourth Amendment. U.S. v. Clyde S.S. Co., 36 F. 2d 691 (2nd Cir. 1929) and U.S. v. Alabama Highway Express, 46 F. Supp. 450 (N.D. Ala. 1942). *

CONCLUSION

Plaintiff's Complaint clearly states a cause of action over which this Court has jurisdiction to grant relief and defendant's motion to dismiss should be denied.

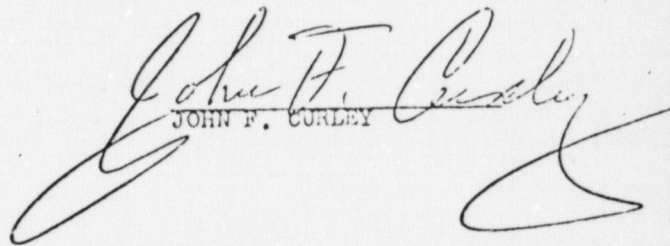
RESPECTFULLY SUBMITTED,


JOHN F. CURLEY
STUART B. ROBBINS
ATTORNEYS FOR PLAINTIFF
INTERSTATE COMMERCE COMMISSION
26 FEDERAL PLAZA, RM. 1807
NEW YORK, NEW YORK 10007
(212) 264-1072

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Memorandum Reply was mailed, postage prepaid to Benjamin Zalman, Frackman & Zalman, One World Trade Center, New York, New York 10048, and Grove, Jaskiewicz, Gilliam & Cobert, 1730 "M" Street, N.W., Suite 501, Washington, D.C. 20036, on September 30, 1975.

Dated at New York, New York.


JOHN F. CORLEY

ANSWER OF
DEFENDANT - APPELLANT

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,)
)
Plaintiff,)
)
v.)
)
ASSOCIATED AIR FREIGHT, INC.,)
a corporation,)
)
Defendant.)

No. 75C-1221

ANSWER

Defendant, Associated Air Freight, Inc., for its answer
to the complaint, admits, denies, and alleges as follows:

First Defense

1. The complaint fails to state a claim against
defendant upon which relief can be granted.

Second Defense

2. Defendant denies each and every allegation of
Section I of the complaint.

Third Defense

3. As to Section II of the complaint, defendant admits
that it was and is a corporation existing under and by virtue of
the laws of the State of Virginia, with its principal place of
business located at 167-16 146th Avenue, Jamaica, Queens, State
and Eastern District of New York. Defendant admits that it is the
holder of Permit No. FF-401, issued to it by the plaintiff on

March 13, 1973, and is authorized to act as a surface freight forwarder. Defendant admits that it is subject to Part IV of the Interstate Commerce Act only to the extent that it is conducting surface freight forwarder operations. Defendant denies that it is within the jurisdiction of this Court. Defendant admits that it holds authority as a domestic and international air freight forwarder from the Civil Aeronautics Board as set forth in CAB Permit Nos. 54 and 116.

4. As to the first paragraph of Count I, defendant admits that it holds authority from the plaintiff in Docket No. FF-401. Defendant admits only that defendant's surface forwarder operations were or are subject to the visitorial and inspection provisions of Section 412(d) of the Interstate Commerce Act [49 U.S.C. §1012(d)]. Defendant's permit in Docket No. FF-401 is the subject of an investigation and revocation proceeding before plaintiff. The contention of plaintiff in that proceeding is that defendant's Permit No. FF-401 should be revoked because defendant has never conducted any operations under this permit.

5. As to the second paragraph of Count I, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

6. As to the third paragraph of Count I, defendant admits that Commission personnel did appear at its place of business at Jamaica, Queens, New York, during normal working hours and did request production of defendant's records of air freight forwarding operations into Minneapolis, Minnesota. Defendant admits that plaintiff's personnel were refused permission to make copies

of certain documents. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in the third paragraph of Count I.

7. As to the fourth paragraph of Count I, defendant admits that an inspection demand letter was received and that a formal demand letter was mailed to defendant. Defendant admits that the appointment for 9:00 A.M. on January 20, 1975, was postponed. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in the fourth paragraph of Count I.

8. As to the fifth paragraph of Count I, defendant admits that a letter was mailed to Assistant Regional Director Lorusso wherein defendant stated that it does not allow access to air freight forwarder documents and records except to the CAB. Defendant admits that the letter set forth the means by which defendant's air freight forwarding records could be examined and concluded by stating that plaintiff's agents had been abusive and threatening. Defendant admits that Mr. Freeman met with Mr. Lorusso on January 30, 1975. Defendant alleges that Mr. Freeman stated that defendant was not refusing to permit the plaintiff to make an inspection, but that because defendant was not performing any operations under its surface freight forwarder permit, defendant had no records subject to the inspection provisions of 49 U.S.C. §1012(d), thus precluding inspection by ICC personnel, except by the means previously outlined. Defendant alleges that it is without knowledge or information sufficient to form a belief

as to the truth of the remainder of the allegations contained in the fifth paragraph of Count I.

9. As to the sixth paragraph of Count I, defendant denies each and every allegation contained therein. Defendant denies that it has or will continue to fail and refuse to submit its accounts, books, records, memoranda, correspondence, and other documents relating to surface air freight forwarding activities for inspection. Defendant alleges that when accounts, books, records, memoranda, correspondence, or other documents are created in regard to surface freight forwarding activities, such documents will be made available to the duly authorized representatives of the plaintiff upon the demand and display of proper credentials.

10. As to the seventh paragraph of Count I, defendant denies each and every allegation contained therein.

11. Defendant denies each and every allegation, statement, and averment contained in the complaint not expressly admitted, qualified, or specifically denied herein.

Fourth Defense

12. Defendant alleges that because plaintiff instigated the proceeding mentioned in paragraph 4 of this answer and plaintiff's assertion therein that defendant has been conducting no surface freight forwarding operations under its permit, plaintiff is precluded from asserting, in this proceeding, that defendant has accounts, books, records, memoranda, correspondence, or other documents which are subject to inspection by plaintiff's agents, and that defendant is in violation of the cited sections of Title 49, United States Code.

WHEREFORE, this defendant prays that the complaint be dismissed, or that judgment be entered in favor of defendant, and against plaintiff herein, that defendant have his costs incurred herein, and for such other and further relief as the Court may deem just.

Respectfully submitted,

ASSOCIATED AIR FREIGHT, INC.

Of Counsel:

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,)

Plaintiff,)

v.)

No. 75C-1221

ASSOCIATED AIR FREIGHT, INC.,)

a corporation,)

Defendant.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Answer of Associated Air Freight, Inc., Defendant, in the above-entitled action, were duly served upon all parties of record by mailing on this date, by first-class mail, postage prepaid, to said parties of record as follows:

John F. Curley
Stuart B. Robbins
Interstate Commerce Commission
Bureau of Enforcement
26 Federal Plaza, Room 1807
New York, New York 10007

Dated at New York, New York, this _____ day of
October, 1975.

Benjamin Zalman

MOTION FOR SUMMARY
JUDGMENT OF PLAINTIFF -
APPELLEE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,
Plaintiff,

v.

ASSOCIATED AIR FREIGHT, INC.,
Defendant.)

CIVIL ACTION NO.
75 C 1221

Jack B. Weinstein, Judge

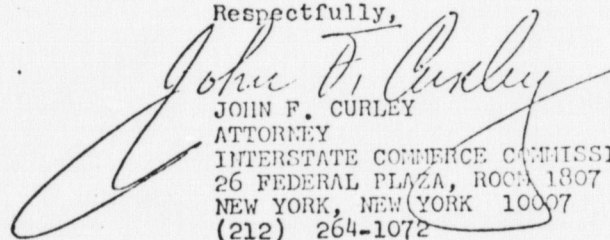
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

Comes now the plaintiff, Interstate Commerce Commission, in this matter and moves the Court pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for Summary Judgment herein on the ground that there is no dispute as to any material fact and that plaintiff is entitled to a Judgment in its favor as a matter of law.

A memorandum in support of plaintiff's motion herein is made a part hereof.

DATED AT NEW YORK, NEW YORK,
NOVEMBER 6, 1975.

Respectfully,


JOHN F. CURLEY
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,	}	CIVIL ACTION NO.
Plaintiff,		<u>75 C 1221</u>
v.		
ASSOCIATED AIR FREIGHT, INC.,	}	
Defendant.)		Jack B. Weinstein, Judge

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for Summary Judgment herein on the ground that there is no genuine issue or dispute as to any material fact; and that the uncontroverted facts permit of no other conclusion but that plaintiff is entitled to the relief sought.

The defense asserted is a legal one which this Court has found to be without merit in its ruling on defendant's Motion to Dismiss. Defendant's answer is an admission of the facts alleged by plaintiff and its defense therein is a restatement of the same grounds which formed the basis of defendant's Motion to Dismiss.

STATEMENT OF THE CASE

Plaintiff's verified Complaint filed July 30, 1975, seeks issuance of an injunction to require defendant, a surfact freight forwarder licensed by plaintiff, to submit its books, records, and other papers to examination and copying by authorized employees of plaintiff.

The action was brought and jurisdiction of the Court is invoked under 49 U.S. Code Sections 1012(d) and 1017(b).

Title 49, U.S. Code, Section 1012(d), which provides for inspection and copying by plaintiff of defendant's books, records, and other papers, reads as follows:

"The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of freight forwarders; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of freight forwarders and of associations (as defined in this section), and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any freight forwarder, as the Commission deems relevant to such person's relation to or transactions with such freight forwarder. Freight forwarders and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this subsection, and freight forwarders shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials."

Jurisdiction to grant the relief is conferred on the Court by Title 49, U.S. Code Section 1017(b)(1) which provides as follows:

"If any freight forwarder fails to comply with or operates in violation of any provision of this part, or any rule, regulation, requirement, or order thereunder, or of any term or condition of any permit, the Commission or the Attorney General of the United States (or, in case of such an order, any party injured by the failure to comply therewith or by the violation thereof) may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such pro-

vision of this part or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ or writs of injunction or other process, mandatory or otherwise, restraining such freight forwarder and any officer, agent, employee, or representative thereof from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition, and enjoining obedience thereto."

Plaintiff's Complaint alleged that defendant was and is an authorized surface freight forwarder and the holder of such a license from plaintiff as issued to defendant on March 13, 1973; that defendant also holds authority as an air freight forwarder from the Civil Aeronautics Board; that on January 13, 1975, plaintiff's authorized representative and employee presented and identified himself at defendant's place of business at Jamaica, Queens, New York, and requested defendant's vice president to produce for examination defendant's records of certain air freight forwarding operations into Minneapolis, Minnesota; that a visual examination was at first allowed but copying was refused and that after some discussion, defendant thereupon refused any access to such records; that following this refusal, plaintiff's representative made two (2) formal written demands upon defendant for access to its books, records, and other papers, including a demand for defendant's "transportation records"; and that defendant has since maintained its refusal to allow examination or copying of its books and records; that by a letter of January 20, 1975, from defendant's president to plaintiff's New York City office, defendant stated that it did not allow access to air freight forwarder records and documents

except to the Civil Aeronautics Board and that defendant's records could be examined by plaintiff by contacting defendant's Terminal Managers at nine (9) points throughout the country; that on January 30, 1975, plaintiff's Assistant Regional Director presented himself at defendant's place of business at Jamaica, Queens, and asked defendant's president to permit the inspection because defendant was the holder of an I.C.C. Permit; that defendant's president said that defendant was not refusing to permit the inspection but that because defendant was not performing any operations under its I.C.C. Permit, defendant had no records available for inspection.

THERE ARE NO MATERIAL FACTS IN DISPUTE

By its Answer to the Complaint filed on or about October 14, 1975, defendant admits that it is the holder of a surface freight forwarder permit issued to it by plaintiff; that it admits that it refused plaintiff's representatives "to make copies of certain documents"; that it admits that it received plaintiff's letters which demanded access to defendant's books and records; that defendant admits that it refused and continues to refuse to permit access to its books and records on the stated ground that it has not conducted any surface freight forwarding operation and has no such documents in its files.

DEFENDANT'S LEGAL DEFENSE

In its Answer defendant claims that it has conducted no operations under the Permit issued to it by plaintiff; that it has no surface freight forwarder records or documents; that records and documents of its air freight forwarding operations are not

subject to examination or copying by plaintiff.

DEFENDANT'S MOTION TO DISMISS

On or about September 18, 1975, defendant moved to dismiss the Complaint on the claimed grounds that 1). this Court was without jurisdiction over the subject matter; and 2). that the Complaint failed to state a cause of action upon which relief might be granted. The essence of that motion was the same as that advanced by defendant's president on the occasions of defendant's earlier refusals.

By its motion, defendant claimed that plaintiff demanded access to records to which plaintiff was not entitled, namely, records which related to operations conducted under defendant's C.A.B. air freight forwarder Permit, and on a second ground, that it had conducted no surface forwarder operations under its I.C.C. Permit, and therefore, it continued, it had no records of a type which plaintiff was entitled to examine or copy. Stated more simply, it was and is defendant's contention that since it claimed that it performed no operations under its I.C.C. Permit, it had no records which were subject to plaintiff's visitorial rights and its refusal to produce other records was lawful. Defendant submitted a memorandum of law in support of its motion to dismiss and plaintiff replied with its memorandum of law in opposition to said motion.

After considering the positions of both parties, as contained in their written submissions and brief

oral argument on October 3, 1975, this Court denied defendant's Motion to Dismiss.

PLAINTIFF IS ENTITLED TO JURISDICTION AS A MATTER
OF LAW ON THE FACTS ADMITTED BY DEFENDANT

Defendant's Answer admits all of the essential facts sufficient to dispose of the matter in accordance with the applicable law; therefore, plaintiff moves for Summary Judgment wholly on the pleadings. Reynolds v. Needle, (App. D.C. 1942) 132 F. 2d 161, 6 F.R. Serv. 56 C 431. Rule 56(a) of the Federal Rules of Civil Procedure.

The legal issue here to be dealt with was considered fully by this Court on defendant's Motion to Dismiss wherein its legal defenses were clearly stated in defendant's memorandum of law in support of its motion. Plaintiff's position is the same now as was contained in its reply to defendant's motion and therefore, plaintiff requests that the Court incorporate by reference herein plaintiff's argument, authorities, and attachments as are set forth in plaintiff's reply to defendant's motion to dismiss.

This Court in denying defendant's Motion to Dismiss has, in effect, held that defendant's substantive legal defense is without merit, and that plaintiff is lawfully entitled to examine and copy defendant's books, records, and other papers without regard to the fact that such books and records may have been made pursuant to operations solely under its air freight forwarding Permit. Defendant's Answer sets forth no legal defense new or different from that advanced in defendant's Motion to Dismiss. Therefore, plaintiff moves this Court for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.

Respectfully submitted,

November 6, 1975
N.Y. N.Y. *John F. Curley*

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ATTORNEY
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REPLY TO MOTION FOR
SUMMARY JUDGMENT

INTERSTATE COMMERCE COMMISSION,)
)
Plaintiff,)
)
v.) No. 75C-1221
)
ASSOCIATED AIR FREIGHT, INC.,)
)
Defendant.)

Comes now Associated Air Freight, Inc., Defendant in the above-captioned proceeding, by its attorneys, and submits its Reply to Plaintiff's Motion for Summary Judgment.

THE PLEADINGS DEMONSTRATE THAT
MATERIAL FACTS ARE IN DISPUTE

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A-62

Defendant's answer specifically denies many of the facts alleged in Plaintiff's complaint and, in addition, alleges other facts which, if proved, will defeat Plaintiff's right to the relief sought.

Among the facts, which Plaintiff must establish in order to be entitled to the relief sought, are the following:

- (1) that Defendant is a freight forwarder as that term is defined in 49 U.S.C. §1002(5);
- (2) that Defendant has accounts, books, records, memoranda, correspondence, or other documents, subject to the Commission inspection privileges;
- (3) that Defendant has unlawfully refused the Commission's special agents access to such accounts, books, records, memoranda, correspondence, or other documents which are subject to those inspection privileges.

The pleadings demonstrate that the above issues hinge on questions of fact which are in dispute.

Section 412(d) of the Interstate Commerce Act [49 U.S.C. §1012(d)] subjects only specifically identified records of freight forwarders to the inspection of Commission personnel. The statute does not grant general inspection privileges to the Plaintiff but only inspection privileges with regard to surface freight forwarder operations. Section 402(a)(5) of the Act [49 U.S.C. §1002(a)(5)] provides:

The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate

commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title. (Emphasis added.)

The issue of whether or not Defendant is a freight forwarder is in dispute. Plaintiff alleges that Defendant is a freight forwarder subject to Part IV of the Interstate Commerce Act because it is the holder of permit No. FF-401. Defendant's answer denies that it is a surface freight forwarder in paragraph 3. Further, nowhere does Defendant expressly admit that it is a freight forwarder. As a result, this factual issue is placed in dispute by paragraph 11 of Defendant's answer. As a result the Plaintiff is required to prove that Defendant does in fact hold itself out as a common carrier. The Plaintiff must adduce evidence at trial of actual operations, advertisements, solicitations, tariffs, insurance coverage, or other evidence to establish that Plaintiff is, in fact, a freight forwarder.

As alleged in paragraph 4 of Defendant's answer, in a proceeding before the Interstate Commerce Commission, Plaintiff is seeking to revoke Defendant's permit, and there Plaintiff alleges that Defendant is not a freight forwarder because it has never conducted any operations under its permit and that its permit should

therefore be revoked. This allegation raises a further dispute as to whether or not Defendant is a surface freight forwarder.

The complaint and answer clearly show that Plaintiff and Defendant have a major dispute as to whether or not Defendant has any accounts, books, records, memoranda, correspondence, or other documents subject to Commission inspection pursuant to 49 U.S.C. §1012(d). This question undoubtedly turns on a conclusion of law but it also turns on inherent questions of fact. The federal courts have long recognized that factual issues and legal conclusions are not always separable. See, e.g., Simpson v. United States, 261 F. 2d 497, 500 (7th Cir. 1958), and Bounds v. United States, 262 F. 2d 876, 880 (4th Cir. 1958).

Several factual determinations are implicit in this mixed question of law and fact. For example, Plaintiff contends at pages 3 and 4 of Plaintiff's Reply to Defendant's Motion to Dismiss that the complaint alleges that defendant refused to permit examination and copying of records other than air freight forwarding records. Plaintiff's Reply to Defendant's Motion to Dismiss is incorporated by reference into Plaintiff's Motion for Summary Judgment. (Plaintiff's Motion for Summary Judgment, p. 6). Implicit in this assertion is the assertion that Defendant has records other than air freight forwarding records. Clearly, Defendant's answer denies that it has such records. This factual dispute is clearly material.

In addition to proving that Defendant is a freight forwarder and that it possesses the requisite documents, Plaintiff must show that Defendant has refused the Commission special agents

access to accounts, books, records, memoranda, correspondence, or other documents which they have a right to inspect. As alleged in paragraph 8 of Defendant's answer the means by which Plaintiff's agents could examine Defendant's records was set forth in a letter to Assistant Regional Director Lorusso. Defendant's answer further alleges in paragraph 8 that Mr. Freeman met with Mr. Lorusso and informed him again that he was willing to allow inspection of records by the means set forth in a previous letter. From these allegations, such a material fact as whether or not Plaintiff's agents have been denied access to any of Defendant's records is in dispute. This fact is an essential portion of Plaintiff's claim.

II

THE PLEADINGS RAISE LEGAL DEFENSES THAT HAVE NOT BEEN RULED UPON

The Plaintiff's contention in its Motion for Summary Judgment is that all Defendant's legal defenses were disposed of in the Court's ruling on Defendant's Motion to Dismiss. As stated above, the Plaintiff's right to the relief sought turns on questions that are mixed questions of law and fact. In ruling on Defendant's Motion to Dismiss the Court necessarily viewed the facts in a light most favorable to the Plaintiff.

It was in this situation that the Court ruled on the legal defense asserted by Plaintiff in the Motion to Dismiss. Defendant's Motion to Dismiss asserted that the complaint alleged that the Plaintiff's agents requested access to only air freight forwarding records. The Plaintiff's Reply asserted that the Complaint alleged that "Associated's records referring to Associated's freight

forwarder Permit" and "Transportation Records" have been requested. (Reply, p. 3). At page 4 of its Reply, Plaintiff made it clear that it was requesting surface freight forwarding records:

. . . it is nevertheless clear that Plaintiff's demand for records was not limited to Defendant's air freight forwarding records but also included other records which indisputably should have been made available to Plaintiff's examination.

This Court necessarily viewed the Complaint in the light most favorable to Plaintiff. Plaintiff's Motion for Summary Judgment now erroneously assumes that the Court does not need to hear evidence as to whether or not Defendant possesses any records subject to the inspection privileges of Plaintiff.

Further, Plaintiff's Motion for Summary Judgment erroneously asserts that the answer raises no new legal defenses. As stated above, paragraph 4 of the Answer alleges facts which, if proved at trial, would preclude Plaintiff from asserting that Defendant has violated any provision of Part IV of the Interstate Commerce Act. This legal defense connected with these factual allegations is set forth in paragraph 12 of the Answer. Clearly, the Court has not ruled on this defense which was not before the Court on Defendant's Motion to Dismiss.

WHEREFORE, it is respectfully prayed that the Plaintiff's
Motion for Summary Judgment be denied.

Respectfully submitted,

ASSOCIATED AIR FREIGHT, INC.

Of Counsel:

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	No. 75C-1221
)	
ASSOCIATED AIR FREIGHT, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Reply to Plaintiff's Motion for Summary Judgment of Associated Air Freight, Inc., Defendant, in the above-entitled action, were duly served upon all parties of record by mailing on this date, by first-class mail, postage prepaid, to said parties of record as follows:

John F. Curley
Stuart B. Robbins
Interstate Commerce Commission
Bureau of Enforcement
26 Federal Plaza, Room 1807
New York, New York 10007

Dated at New York, New York, this _____ day of
November, 1975.

Benjamin Zalman

TRANSCRIPT OF HEARING
ON MOTION FOR SUMMARY
JUDGMENT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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INTERSTATE COMMERCE COMMISSION, :
-against- : 75-C-1221
ASSOCIATED AIR FREIGHT, INC., :
Defendant. :

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United States Courthouse
Brooklyn, New York
November 21, 1975
10:00 o'clock A.M.

B e f o r e :
HONORABLE JACK B. WEINSTEIN, U.S.D.J.

JOSEPH BARBELLA
OFFICIAL COURT REPORTER

Appearances:

JOHN F. CURLEY, ESQ.
Interstate Commerce Commission
26 Federal Plaza
New York, N.Y.

BENJAMIN ZALMAN, ESQ.
One World Trade Center
Suite 3553
New York, New York
Attorney for Defendant

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2 THE COURT: This case has been before the
3 Court on a number of occasions. The Court has heard
4 extensive argument and has examined the entire file
5 on this and prior occasions when the defendant made
6 a motion to dismiss which was denied.

7 The defendant is licensed by the CAB. Since
8 1973 it has also had a certificate from the ICC as
9 a surface freight forwarder. Under the statute, the
10 ICC has the clear right to examine the books and
11 records of surface freight forwarders to determine
12 what their activities are and whether they are
13 complying with the law and regulations.

14 The defendant claims that there are a number
15 of questions of fact which prevent the Court from
16 granting the Plaintiff's motion for summary judgment
17 to permit it to inspect the books and records of the
18 defendant. These questions of fact include:

19 1. Is the defendant in fact a surface freight
20 forwarder?

21 2. Does the defendant in fact have in its
22 possession books of account reflecting activities of
23 a surface freight forwarder?

24 Are there any other issues of fact?

25 MR. ZALMAN: There are a number of other

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1 issues of fact, your Honor. There was and there is
2 an issue as to whether or not there was an unlawful
3 refusal.

4 THE COURT: Three. Whether there was an
5 unlawful refusal by the defendant to permit the ICC
6 to investigate and examine the books.

7 Anything further?

8 MR. ZALMAN: No, your Honor.

9 THE COURT: The motion for summary judgment
10 must be granted. The fact that there is a
11 certificate outstanding is presumptive proof subject
12 to rebuttal. No rebuttal has been submitted for
13 this purpose. Therefore, the defendant must be
14 considered to have a valid certificate as a surface
15 freight forwarder.

16 The Court will assume that in view of the
17 certificate which it itself applied for necessarily,
18 it is in fact a surface freight forwarder until and
19 unless it moves to have that certificate revoked.
20 As a surface freight forwarder it should have in its
21 possession books of account. The Interstate
22 Commerce Commission is entitled to see those books
23 of account in order to decide for itself the nature
24 and kind of activities of a defendant. The
25 defendant cannot be permitted to judge what books

are relevant to the investigation.

The courts have interpreted the statutory authority of the ICC quite broadly in this respect. See e.g., *Cooper's Express, Inc. v. ICC* 330 F. 2d 338 (First Circuit 1964)

There is another practical reason why this motion must be granted. If we assume that there were triable issues of fact with respect to the three matters already stated, and if the Court denied summary judgment, the Plaintiff would be entitled under the Federal Rules of Civil Procedure to complete discovery. The Court would immediately order the defendant to make available to the Plaintiff all the books and records which the Plaintiff now seeks in order to determine whether it has the right to seek those books.

To permit a suit to continue where interlocutory relief, which must be granted under these circumstances, would in effect grant the final relief sought by the Plaintiff, would be to make a mockery of the litigation procedures of the Court.

As a practical, as well as a legal matter, therefore, the motion for summary judgment is granted without cost.

Are there any further findings of fact that

1
2 you want?

3 MR. CURLEY: No, your Honor. Only I would
4 inquire as to when this order would become effective.

5 THE COURT: Effective as soon as you submit
6 it. Submit an order within forty-eight hours.

7 MR. CURLEY: Directed to the Court?

8 THE COURT: Yes.

9 Does the defendant want any further findings?

10 MR. ZALMAN: No, your Honor.

11 THE COURT: Thank you.

12 MR. CURLEY: Thank you, your Honor.

13 THE COURT: Motion granted.

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JUDGMENT AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,
PLAINTIFF,
V.
ASSOCIATED AIR FREIGHT, INC.,
DEFENDANT.

CIVIL ACTION NO. 75-3-1231

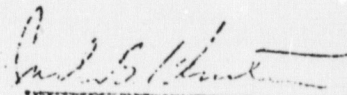
JUDGE JACK B. WEINSTEIN

JUDGMENT AND ORDER

The Court having considered plaintiff's Motion for Summary Judgment and the representations and submissions of both parties:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That defendant Associated Airfreight, Inc., a corporation, its agents, employees, representatives, and those persons acting under its supervision or control, be permanently enjoined and restrained, from in any manner or by any device directly or indirectly, failing or refusing to submit any and all of its accounts, books, records, memoranda, correspondence, and other documents, to the plaintiff, Interstate Commerce Commission, or its duly authorized Special Agents, Associates, or Examiners during normal business hours for their inspection, examination, and copying upon demand and display of proper credentials while it holds authority as a freight forwarder subject to the Interstate Commerce Act.

The case will be marked closed
DATED THIS 23 DAY OF November, 1975.

Signed

UNITED STATES DISTRICT COURT
JACK B. WEINSTEIN

JUDGMENT AND ORDER ENTERED

CLERK

BY:

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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INTERSTATE COMMERCE COMMISSION,

Plaintiff,

- against -

ASSOCIATED AIR FREIGHT, INC.,

Defendant.

NOTICE OF APPEAL

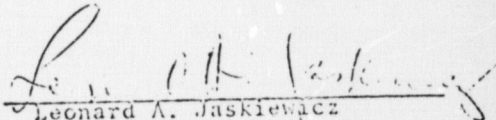
No. 75C-1221

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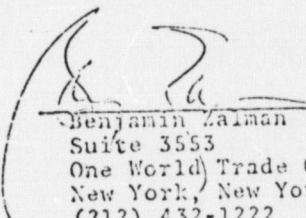
NOTICE is hereby given that Associated Air Freight, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the District Court granting the Motion of plaintiff for summary judgment and from the judgment of the District Court pursuant to that order granting to plaintiff the requested injunction and restraining order. The judgment and order in this action was entered on the 24th day of November, 1975.

Dated: New York, N.Y.
November 25, 1975

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INJUNCTION PENDING

APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
INTERSTATE COMMERCE COMMISSION,

No. 75C-1271

Plaintiff,

ORDER

- against -

ASSOCIATED AIR FREIGHT, INC.,

Defendant.
-----x

Notice having been given that Associated Air Freight, Inc., defendant above named, has appealed to the United States Court of Appeals for the Second Circuit the order of this Court granting Plaintiff's Motion for summary judgment, and the final judgment of this Court in this action, and good cause appearing therefor;

IT IS ORDERED that the order and final judgment of this Court which are the subject of the noted appeal are hereby enjoined and otherwise stayed pending the resolution of that appeal. Defendant shall not destroy any of its documents sought by plaintiff.

S/ Jack B. Weinstein

Dated: Brooklyn, New York
November 25, 1975 United States District Court Judge